FILED

(1) 03 421 SEP 15 2003

No. _____

In The
Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

v.

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, AND THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit Requesting Reversal Of Denial Of Motion For Relief (Dated June 17, 2003) From A Final Decision Of The Court Reached In Reliance Upon Fraud Upon The Court Perpetrated By Attorneys For The Municipal Defendants In The Form Of Misrepresentation Of That Determinative Fact Upon Which The Court Relied To Dismiss A Meritorious Regulatory Takings Action

PETITION FOR A WRIT OF CERTIORARI

PETER SUDARSKY
135 Central Park W
Apt. 12N
New York, New York 10023
(212) 595-7172

47 pp

QUESTION PRESENTED

Introduction

Two attorneys for the City of New York and its Metropolitan Transit Agency misrepresented in a last minute letter-submission to the Court of Appeals the one determinative fact upon which the Second Circuit could and did rely to affirm a dismissal of Plaintiff's claim for failure to pay just compensation for the taking of property.

Issue

Where a federal court of appeals has relied upon fraud on the court in the form of misrepresentation of a determinative fact fabricated by attorneys for municipal defendants in their capacity as officers of the court to dismiss a meritorious claim based on the abrogation of a constitutional right, is a Court's failure to grant relief on motion by plaintiff an abuse of discretion?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit of New York filed Nov. 14, 2001, is unpublished and is produced in the Appendix as Appendix C. The opinion and order of the United States District Court for the Southern District of New York (Oct. 20, 2000) is reproduced in the Appendix as App. D (99 Civ. 10921).

JURISDICTION

Denial of rehearing en banc of denial of rehearing from the Court of Appeals is dated June 17, 2003. Permission was granted by the Court below to submit Petition for en banc review of its refusal to grant relief dated Feb. 25, 2003. Denials appear as App. A and App. B. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND COURT RULE

This petition relies upon the just compensation clause of the Fifth Amendment and the due process clause which provide that no person shall be deprived of life, liberty or property without due process of law. Plaintiff also relies on federal rule 60(b)3 dealing with Fraud on the Court. While the rule applies to District Courts, its procedures have been accepted by a majority of the Circuit Courts of Appeals when fraud or misrepresentation occurs at the level of the Court of Appeals. A decision which rests on allegations of fact contradicted by the record and by affirmations of a plaintiff, even a pro se plaintiff, is a

denial of due process, common sense and the obligation of all courts in the nation to uphold the integrity of the judicial system.

STATEMENT OF THE CASE

THE DECISION OF THE COURT BELOW RESTS SOLELY ON FRAUD UPON THE COURT. FAILURE TO GRANT PLAINTIFF'S MOTION FOR RELIEF FOR AFTER-DISCOVERED FRAUD COMPROMISES THE INTEGRITY OF THE JUDICIAL PROCESS AND CALLS FOR AN EXERCISE OF THIS COURT'S SUPERVISORY FUNCTION ELOQUENTLY EXPRESSED IN *SORRELLS V. UNITED STATES* (287 U.S. 435 (1928)) AS ITS OBLIGATION TO UPHOLD "THE PURITY OF ITS OWN TEMPLE."

Two attorneys or the defendants, one representing the City of New York and the other the NYC transit agencies, fabricated a number of misrepresentations in a letter which they then submitted to the Court below at its request to which plaintiff had no opportuity to respond. The Court below then rejected plaintiff's appeal of a District Court dismissal on res judicata grounds although no prior decision had ever litigated or permitted argument of the issues. The Court of Appeals, as indicated by the language in its decision, acted in reliance upon one of those misrepresentations which was contradicted by facts in the record and refuted by facts in affirmations by a pro se plaintiff which the Court below failed to reach. (The Court of Appeals in an unfamiliar role as a finder of fact held that Plaintiff had not submitted more than one development application as required to ripen his claim

when, in fact, he had submitted a plethora of such applications noted to in the Record).

PLAINTIFF'S PETITION BRINGS INTO FOCUS INCONSISTENCIES WITHIN THE CIRCUITS IN THE APPLICATION OF THE DOCTRINE OF INHERENT POWERS TO MOTIONS FOR RELIEF FROM FINAL DECISIONS BASED ON MISREPRESENTATION AND FRAUD. UNDER WHAT CONDITIONS DOES RELIEF BECOME AN OBLIGATION AS OPPOSED TO A MERE OPTION? THE QUESTION IS ONE OF CONJECTURE AND CONFUSION. DIFFERENT ANSWERS COME FROM DIFFERENT CIRCUITS.

In *Hazel-Atlas Glass*, this Court speaks of a "duty" to grant relief where the integrity of the judicial process is compromised. Does misrepresentation by attorneys in their capacity as officers of the court convert discretion to grant relief to a duty, and if so, under what conditions? This case provides an opportunity to examine this question.

The case has been around for a long time. Seven years were required in state courts to exhaust state court remedies. The cause of action is clear and complete. It is an abuse of judicial power for the case now to be dismissed on the basis of fraud by defendants' attorneys upon which a court of appeals has relied to dismiss an appeal which may otherwise have been granted.

Plaintiff has asked that the one word denial of his motion for relief (App. 1) be reversed and that the case be remanded for consideration absent the misrepresentation upon which the Court below relied to dismiss.

Facts and Procedural History

Plaintiff owned eight contiguous buildings in midtown Manhattan and was prevented from making any use of them for a period of time which appeared likely to last forever by actions of the municipal defendants.

As directed by the Federal District Court in 1991, Plaintiff filed his regulatory takings claim in state court where he exhausted state judicial remedies. On procedural grounds of failure to file notice of claim, the case was dismissed in state court without litigation on the merits although the City was on notice.

The Appellate Division of the NY Supreme Court First Dept. first held that the prior Federal District Court 1991 decision was "not final" and did not provide grounds for application of the res judicata doctrine (see App. E, 220 A.b. dec. 353, Oct. 31, 1995) in reversing a dismissal by the trial court (App. G) on res judicata grounds. This state court decision precludes a dismissal on res judicata grounds by a federal court as a matter of law.

Following an erroneous dismissal by the trial court on timeliness grounds (App. H), the Appellate Div. now dismissed for plaintiff's failure to meet notice of claim requirements of state law although defendants were on real notice (App. F). In an obvious effort to unload an old case which had been around for too long, the A.D. also held without argument or litigation on the merits that the case lacked merit enough for waiver of the state requirement for notice. As held in *Felder v. Casey*, 487 U.S. 131 (1988) by this Court, notice of claim may not serve as a bar to suit in the federal courts based on abrogation of rights given by the Constitution.

Plaintiff filed anew in the federal courts where the case was dismissed on res judicata grounds by the District Court (Memorandum Opinion and Order Barbara S. Jones, Oct. 20, 2000, 99 Civ. 10921 App. D, granting Defendants' motion pursuant to Rule 12b1 and 12b6). The order appears to have been based on that 1991 District Court decision held "not final" by the state Appellate Division in the decision above noted. The issue of additional applications had not been argued or litigated. Defendants failed to forward pleadings submitted by the pro se plaintiff in their compilation of documents asked for by the District Court (as acknowledged in City letter to the Appellate Div. on pg. 421 of the Record on Appeal). The District Court failed to make any reference to documents provided by plaintiff, which included the cited Appellate Div. decision.

On appeal, when it became obvious that the parties did not agree on the question of whether plaintiff had ripened his claim, the Second Circuit asked for a letter at oral argument from plaintiff and a final letter from attorneys for the City of New York, who then misrepresented to the Court that Plaintiff had failed to file alternative applications necessary to ripen his claim when they had in their hands a plethora of such applications previously served on defendants and also provided again in discovery. Acting solely on that misrepresentation, the Court below then affirmed the dismissal of the District Court (ibid), not on res judicata grounds but on grounds of Plaintiff's alleged failure to submit alternate applications (Nov. 14, 2001, Order of court dismissing Plaintiff's appeal in reliance upon Defendants' misrepresentation App. C).

Plaintiff's timely Motion for Relief was summarily rejected (Feb. 25, 2003, in one word DENIED, App. B).

His motion for en banc relief from that rejection (the subject of this Petition) was then submitted on motion for consent with the permission of the Court. It was rejected on grounds that "no active member of the Court" asked for a vote on his Motion for Relief from a finding by the Second Circuit which bears directly on the integrity of the judicial process. (See Order of the Court June 17, 2003, App. A herein). Plaintiff's motion was based on the uncontested fact that the Court had relied to dismiss on the misrepresentation by defendants of a determinative fact that plaintiff failed to ripen his claim by submitting alternative development proposals when he had done so and that as a consequence plaintiff had not obtained a final determination of the permitted use of the property which had, in fact, been delivered to him by the City.

Evidence of Fraud is Clear and Convincing

Defendants' misrepresentation (that plaintiff failed to take actions to ripen his claim) was the one specific claim upon which the Court could be expected to deny access to the federal courtroom on ripeness grounds. Facts in affirmations by plaintiff and evidence in discovery refute the misrepresentation upon which the court below relied to dismiss. Final determination of permitted use of the property was set in stone by defendants' spot rezoning which provided FAR, density, lot coverage, height and occupancy of a new building on the vacant and fallow property, as affirmed in the Record on Appeal p. 434.

Defendants' letter submission to the Court of Appeals to which plaintiff had no opportunity to reply is included here as App. I. The letter, printed on stationary of the Corporate Counsel and signed by the two attorneys for the

transit and City defendants who created it, reads in part, "The bottom line is that appellant never submitted more than one development plan before deciding to sell the property."

The decision of the Second Circuit in reliance upon that letter (App. C) reads in part, "Plaintiff never requested a variance from the new zoning requirements or submitted a proposal other than his original 17-story building" (Court's Order, p. 3, App. C).

It is undisputed that a variance application was unavailable at law in New York at the time (noted in the Record on Appeal p. 421). Defendants have made no effort to deny the allegation of misrepresentation and fraud.

A paragraph from the Record in a brief-affirmation by the plaintiff, who was pro se at the time, makes reference to alternative applications in the hands of defendants. The paragraph cited directly from p. 406 of the Record follows:

> "DEFENDANTS' CERTIFICATION OF AN EASEMENT REQUIREMENT BUILT AN INVISIBLE FENCE AROUND THE PROPERTY WHICH BARRED ALTERNATE DEVELOPMENT PROPOSALS. The City claims that my action is based on its rejection of a single development plan. It is not. My action is based on defendants' conditioning issuance of any permit on my dedication of an easement, after which defendants refused to consider alternate development plans which my architects and I continued to propose" (A406 of Record on Appeal from a brief-affirmation submitted to the District Court by plaintiff while acting pro se).

> (Rather than submitting pages of architectural and engineering proposals to complicate the Record, plaintiff relied upon federal rules which hold that facts in affirmations by a plaintiff will be taken in their best light on motion for summary judgment as reaffirmed by this Court in *Jennifer Harbury v. Warren Christopher*.)

This paragraph from the Record makes reference to a number of development proposals provided by plaintiff, his attorneys and his architects to the municipal defendants who are presumed to have had knowledge of such applications at the time they submitted their joint letter denying that such applications existed. App. K is the cover of a 42-page submission to defendants by plaintiff's planning architects containing a series of alternative plans. The cover page has a stamp by a court stenographer indicating that it had been accepted as an exhibit in a deposition held as part of the discovery process. Plaintiff's submissions of additional plans were concealed by defendants' attorneys in their final letter which was nonresponsive to plaintiff's own letter (App. J) and which contained an additional misrepresentation. The letter says plaintiff lacked financing. In fact, as noted in the brief *amicus curiae* of Defenders of Property in Washington, D.C., plaintiff had obtained financing from a Japanese bank which needed residences in the area for its executives. The local community board expressed concern about the racial make-up in the area of E. 52nd St. as noted in plaintiff's Complaint (in Record on Appeal p. 21).

Plaintiff now seeks relief from a decision based solely on deliberate fraud perpetrated by attorneys for government agencies in their capacity as officers of the court.

Review is appropriate absent the misrepresentation upon which the Court below relied to dismiss.

ARGUMENT

CIRCUITS ARE IN HOPELESS DISARRAY ON THE ISSUE OF WHETHER A FEDERAL COURT HAS THE OBLIGATION TO GRANT RELIEF FROM A DECISION REACHED IN RELIANCE UPON FRAUD ON THE COURT PERPETRATED BY ATTORNEYS IN THEIR CAPACITY AS OFFICERS OF THE COURT

In *Martha Ann Brundage Rozier v. Ford Motor Co.*, no. 77-1929, the Fifth Circuit reversed the denial of a rehearing en banc where attorneys for defendant failed to provide information in conflict with discovery data.

In *Dixon v. Comm'r of Internal Revenue*, 9th Cir. no. 00-70858 the Court decided in 2003 that "when we conclude that the integrity of the judicial process has been harmed and fraud rises to the level of 'an unconscionable plan or scheme which is designed to improperly influence the court' we not only can act, we should." In *Hazel-Atlas Glass*, this Court observed there is a "duty" to grant relief. But whether a court is required to grant relief remains an option.

In the pendant case, the Second Circuit dismissed a Petition for Rehearing en banc because no active member of the court was willing to embarrass panel members by asking the Court to vote on the Petition seeking relief from a decision which rests on the Court's reliance on Fraud. Other circuits have been reluctant to grant relief on the

basis of misrepresentation by attorneys, holding that attorneys in an adversarial system are allowed excesses.

In *Sorrells v. United States*, 287 U.S. 435 (1928), this Court affirmed its supervisory role over "the purity of its own temple." Unless the Court intends to abdicate its responsibility to the integrity of the judicial process, it will not permit denial of relief from a decision based on undenied misrepresentation of that determinative fact upon which the Court below relied to dismiss an otherwise meritorious action. Reprimand, not reward, should be the result of such misrepresentation.

In particular, a requirement to avoid reliance upon misrepresentation by agencies of government must be enforced if the line between the judicial and executive branches is not to be blurred.

The doctrine of inherent power is intended to achieve justice and a full hearing on issues. Where misrepresentation has closed the door to trial of the merits and argument on the issues, the Court may choose to apply its supervisory power to avoid a compromise in the integrity of the judicial process and to preserve a right to fair trial.

The validity of plaintiff's claim is not an issue before the Court as it was in *Jennifer Harbury v. Warren Christopher*, recently decided. No court, state or federal, has ever ruled on the merits after litigation or argument of the issues. Plaintiff invested $22,000,000 in eight properties in midtown Manhattan. He was stopped from all use of them for a period of time which could last forever. Delay was substituted for confiscation by the City. Issues of fact raised by the case require adjudication for a decision on the merits, as noted in the *amicus curiae* brief offered to

the District Court by Defenders of Property in Washington, D.C. (In Record on Appeal, pgs. A24 to A35) in support of Plaintiff's claim.

A decision which rests on a set of facts known to be false compromises the integrity of the judicial process. Plaintiff asks for relief and remand for consideration absent the fraud upon which the court below relied to dismiss.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of June two thousand three.

Sudarsky

v

City of New York

Dkt No: 00-9470

(Filed Jun. 17, 2003)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Peter Sudarsky.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: /s/ Arthur M. Heller
Arthur M. Heller,
Administrative Attorney

p o ccc
inbancdn frm

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square
40 Centre Street, New York, NY 10007
Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption (use short title)

Peter Sudarsky

v.

The City of New York

Docket Number(s): 00-9470

Motion for: Relief under Rule 60(b)3 from a final ORDER dismissing Plaintiff's regulatory takings action dated Nov. 14, 2001

Set forth below precise, complete statement of relief sought: (see statement attached) Relief from this Court's Final Order, Nov. 14, 2001, based on misconduct and FRAUD on the Court; trial of the merits and appointment of Counsel

MOVING PARTY: Peter Sudarsky

[X] Plaintiff [ ] Defendant

[ ] Appellant/Petitioner [ ] Appellee/Respondent

MOVING ATTORNEY: Plaintiff pro se

(name of attorney, with firm, address, phone number and e-mail)

ORDER

Before: Hon. Rosemary S. Pooler, Hon. Robert A. Katzmann, *Circuit Judges*; Hon. David N. Hurd,* *District Judge*.

Appellant filed a motion for relief under Rule 60(b)(3), a correction to the motion for relief, and three supplements to the motion for relief. The Court having reviewed these filings, IT IS HEREBY ORDERED that appellant's motion for relief is DENIED.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
CLERK
By: /s/ Laura Bass Penn
Laura Bass Penn,
Motions Staff Attorney

FEB 25 2003
Date

* The Honorable David N. Hurd [illegible] United States District Court for the Northern District of New York, sitting by designation.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

00-9470
Filed November 14, 2001

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of November two thousand and one.

Present: ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
Circuit Judges,
DAVID N. HURD,
District Judge.*

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* The Honorable David N. Hurd of the United States District Court for the Northern District of New York, sitting by designation.

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiffs,

PETER SUDARSKY,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK, THE NEW YORK PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSPORTATION AUTHORITY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants-Appellees.

Appearing for Plaintiff-Appellant:

Peter Sudarsky, *pro se*, New York, NY
David J. Bederman, Esq., Atlanta, GA

Appearing for Defendants-Appellees:

Sharyn Rootenberg, Assistant Corporation Counsel (Michael D. Hess, Corporation Counsel, Larry A. Sonnenshein, Louise Moed, Assistant Corporation Counsels, on the brief), New York, NY *for municipal defendants-appellees.*

Ira J. Lipton (Mary Jennings Mahon, Deputy Executive Director and General Counsel, Metropolitan Transportation Authority), New York, NY *for transit defendants-appellees.*

Appeal from judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) dismissing plaintiff's complaint.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Peter Sudarsky appeals from the October 26, 2000, judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) dismissing his complaint principally on grounds of *res judicata*. Sudarsky filed his complaint on October 29, 1999, raising many of the allegations he prosecuted in a federal lawsuit filed in 1989 and a state court lawsuit filed in 1993. All of the litigation stems from Sudarsky's attempt to develop eight lots on East 52nd and East 53rd streets in Manhattan into a single 17-story apartment building. During the planning process, city officials informed Sudarsky that they required a transit easement on his property for an underground pedestrian tunnel for subway passengers. While Sudarsky negotiated the easement, the city's Board of Estimate in October 1987 "downzoned" the area including Sudarsky's property to prohibit construction of buildings taller than eight stories. Sudarsky did not seek a variance or submit another building proposal to the city but instead sold his properties in 1988. Although defendants claim that Sudarsky approximately recovered his purchase price of $12 million, Sudarsky claims to have lost $10 million in development costs.

The key points of Sudarsky's litigation are as follows. Plaintiff filed a lawsuit in federal court, which the district court dismissed in 1991. *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991). In its 1991 decision, the district court dismissed on the merits

Sudarsky's causes of action under substantive due process, procedural due process and equal protection theories. With respect to plaintiff's allegations that defendants' actions were an unconstitutional taking, the district court first held on the merits that requiring a transit easement was not an impermissible condition on a building permit. *Id.* at 299. The district court also held that plaintiff's regulatory takings claim was not ripe because (1) he failed to obtain a final and authoritative determination from the city regarding what development it would permit on Sudarsky's property; and (2) he failed to use the state court system to seek just compensation for his property. *Id.* at 300-01. Sudarsky then filed a lawsuit in state court pressing, among other things, his regulatory takings claim. The New York courts ultimately dismissed the lawsuit in 1997 because plaintiff failed to file a notice of claim with the city. *Sudarsky v. City of New York*, 668 N.Y.S.2d 350 (1st Dep't 1998). Importantly, the state court refused to give Sudarsky permission to file a late notice of claim because he failed to adequately explain his delay and his lawsuit was "without substantive merit." *Id.* at 351. Sudarsky then brought the present lawsuit in federal court.

On appeal, Sudarsky claims that his second federal complaint is justiciable because neither the federal court nor state court dismissed his regulatory takings claim on the merits. In order to state a claim for regulatory takings, plaintiff must show first that the regulation has taken his property by going "too far" and second that any proffered compensation is not just. *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Plaintiff under no set of facts can satisfy the first element of his claim. While the 1991 district court decision used the term "unripe" to describe its dismissal of Sudarsky's claim for his failure to obtain a determination

of the property's permitted uses, it now is undisputed that plaintiff never will be able to do so because he sold the property before obtaining the required determination. Plaintiff never requested a variance from the new zoning requirements or submitted a proposal other than his original 17-story apartment building. In other words, plaintiff never will be able to show that the city's downzoning went too far in prohibiting development of his property. His claim never will be "ripe." Contrary to plaintiff's suggestion, this holding is consistent with Supreme Court precedent. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-39 (1997). Unlike the case before us, the land use regulation in *Suitum* was much more restrictive, permitting no development at all on plaintiff's land, which gave rise to the finality necessary for ripeness. Dismissal under Fed. R. Civ. P. 12(b)(6) was proper.

We have considered all of plaintiff-appellant's remaining arguments and find them to be without merit.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: LUCILLE CARR

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

99 Civ. 10921 (BSJ)

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiff,

—v.—

THE CITY OF NEW YORK, THE NEW YORK PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSPORTATION AUTHORITY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

Memorandum Opinion and Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Before the Court is defendants' motion pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss plaintiff's complaint. For the reasons stated below, the motion is *granted*.

By this action, plaintiff *pro se* Peter Sudarsky seeks to recover damages in connection with a failed plan to develop a parcel of real estate he purchased on Man-

hattan's East Side. In particular, he alleges that defendants impeded his plans by requesting an easement for transit purposes, thus delaying the issuance of a building permit, and that, during the course of the delay, defendant City of New York (the "City") downzoned the area in which plaintiff's parcel was located, rendering his proposed structure too large to be built. Plaintiff claims that defendants' actions amounted to a taking of his property without just compensation, in violation of his rights under the Fifth and Fourteenth Amendments. He has named as defendants the City, the New York City Planning Commission ("CPC"), and the New York City Department of City Planning ("DCP") (referred to collectively herein as the "City"), as well as the New York City Transit Authority ("MTA") (referred to collectively herein as "Transit Defendants").

"Traditionally, the doctrine of *res judicata*, or claim preclusion, provides that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' " *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Plaintiff's claims alleging a violation of his substantive and procedural due process rights, as well as his equal protection rights, were dismissed by Judge Ward in a scholarly and very detailed opinion in 1991. *See Sudarsky v. City of New York et al.*, 779 F. Supp. 287 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1064, *reh'g denied*, 507 U.S. 980 (1993).

Plaintiff now seizes upon Judge Ward's determination that his regulatory takings claim was not ripe, *see id.* at 301 ("Plaintiffs did not make use of the state court system in order to obtain compensation for their alleged taking, and thus their takings claim is unripe for this rea-

son as well."), to support his theory that this Court left open the possibility that he could return to this Court and relitigate this particular issue, if he was unsuccessful, in state court.

Preliminarily, it should be noted that plaintiff's allegations in the Complaint that there was something unlawful about defendants' insistence that an easement be given as a condition to the development of his parcel, (*See* Compl. pp. 7 & 9.), were explicitly addressed and rejected by Judge Ward. *See Sudarsky,* 779 F. Supp. at 298-301. Judge Ward found that the defendants had established the reasonableness of requiring an easement for subway access in order to offset the increase in pedestrian traffic that might be associated with plaintiff's development. *See id.*

As to the regulatory takings claim—the aspect of plaintiff's takings claim that was held to be unripe—plaintiff misperceived this Court's ruling. As this Court has already ruled, in order to maintain a claim for a regulatory taking of property, a plaintiff must establish that he was denied economically viable use of his property by virtue of the regulation at issue; and in order to establish that he was so deprived, a plaintiff must first obtain "a final authoritative determination of the type and intensity of development legally permitted on the subject property." *See id.* at 300.

It is here that plaintiff ignores the crucial holding of this Court in its 1991 decision that Sudarsky "was required to obtain a conclusive determination as to what type of development would be allowed on [his] property . . . . Plaintiffs made no such effort, and may not now pursue a regulatory takings claim in federal court." *Id.* at 300-01.

This holding precludes plaintiff's new Complaint. As this Court noted in 1991, plaintiff opted to sell off all of

the property in question within a year after the City downzoned the area. Indeed, he sold the property for $12 million, *see id.* at 293, approximately the same price at which he purchased it, which at the very least, establishes that the property was at least no less economically viable than when he bought it. More importantly, however, plaintiff sold the property rather than obtain from the appropriate agencies a determination as to its maximum economic use.

Subsequent to the dismissal of his federal lawsuit, plaintiff brought suit in state court on claims arising under the same facts and circumstances as those presented in federal court. The state courts dismissed plaintiff's claims as well.

It is well settled that, pursuant to the Constitution's Full Faith and Credit Clause, "a federal court must give to a state court judgement the same preclusive effect as would be given that judgement under the law of the State in which the judgement was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also Burgos v. Hopkins*, 14 F.3d at 789.

That plaintiff presented his regulatory takings claim in state court is manifest both in his state court pleadings and in his various briefs and memoranda presented throughout the history of the state court proceedings. For example, after laying out factual allegations that closely track the allegations in this Complaint, plaintiff claimed—as he does now—that the transit easement was used to deprive him of his right to develop his property according to the plans he submitted, and that defendants' actions in this regard constituted a *de facto* taking in violation of his constitutional rights. (*See* Plaintiff's February 17, 1993 Amended Complaint at ¶¶ 73, 84.) While plaintiff limited his pleading to claims arising under the New York State Constitution, he nonetheless frequently

raised arguments in state court predicated upon federal law

In granting defendant's summary judgement motion, New York state courts rejected plaintiff's constitutional claims. Indeed, both the Appellate Division, First Department, as well as the Court of Appeals, affirmatively acknowledged that plaintiff had presented constitutional claims and expressly rejected them.

The Appellate Division, First Department held that, "for the reasons stated by the Federal court in dismissing plaintiff's prior federal action, the challenged governmental action does not fall below a floor of constitutional protection for property owners." *Sudarsky v. City of New York*, 247 A.D.2d 206 (1st Dept.) (quotation marks and citations omitted), *app. dismissed*, 92 N.Y.2d 845, *lv. to app. denied*, 92 N.Y.2d 815 (1998), *rearg. denied*, 93 N.Y.2d 849, *rearg. dismissed*, 93 N.Y.2d 1042, *cert. denied*, 120 S. Ct. 49 (1999).

Plaintiff may not avoid the application of *res judicata* by asserting that he withheld his federal claims from the state court proceeding. As set forth above, plaintiff did in fact raise his federal claims in state court.

Further, where plaintiff's federal "takings" claim is considered unripe, and the litigant seeks instead to vindicate his rights in state court, the final state court judgement precludes subsequent litigation on that claim in federal court. *See Palomar Mobilehome Park Assoc. v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3rd Cir. 1989).

Defendants' motion pursuant to Rule 12(b)(1) and 12(b)(6) for an order granting summary judgment is *granted*. The Clerk of the Court is directed to enter judgment in favor of the defendant and close the case.

SO ORDERED:

BARBARA S. JONES
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
October 20, 2000

Appendix E

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

PETER SUDARSKY ET AL., APPELLANTS,

M. Berger

—v.—

THE CITY OF NEW YORK ET AL., RESPONDENTS

L. Jaeger

MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR
LEAVE TO FILE LATE NOTICE OF CLAIM

DECIDED: OCT 31, 1995 ENTERED: OCT. 31, 1995

HON: Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

OPINION: Order, Supreme Court, New York County (Salvador Collazo, J.), entered April 14, 1994, granting defendants' motion for summary judgment dismissing the complaint on the grounds of res judicata and collateral estoppel, and denying plaintiffs' cross-motion to file

a late notice of claim or to deem prior filings to constitute a notice of claim pursuant to General Municipal Law § 50-e, unanimously reversed, on the law, defendants' motion denied, the complaint reinstated and the matter remanded for further proceedings, without costs.

The plaintiffs assembled eight contiguous buildings on East 52nd Street and East 53rd Streets in Manhattan for the purpose of constructing a 17-story residential building on the East 52nd Street site and renovating the three buildings on East 53rd Street. They contend that by reason of various actions or inactions, the defendants held up the proposed project until the area was downzoned, thus preventing the consummation of their plan and resulting in the sale of the parcel for $10 million, less than its fair market value before downzoning.

Plaintiffs initially sued in the United States District Court for the Southern District of New York, alleging constitutional claim and the defendants were granted summary judgment on plaintiffs' regulatory taking claim, basically on the ground that the matter was not ripe for adjudication inasmuch as there had not been a final determination by the local administrative agencies with respect to the issues and plaintiffs had not made use of the State court system in order to obtain compensation for the alleged taking, and dismissed plaintiffs' pendent State claims under the abstention doctrine (Sudarsky v City of New York, 779 F Supp 287, affd 969 F 2d 1041, cert denied 506 US 1084, reh denied 507 US 980, motion to vacate denied 1992 US Dist LEXIS 16557 [SD NY, Oct. 28 1992, Ward, J.], reh denied 1993 US Dist LEXIS 53 [SD NY, Jan. 5, 1993, Ward, J.].

Under the circumstances, the Federal court's determination was not final and so could not be the ground for application of the doctrine of res judicata, although some aspects might have a collateral estoppel effect,

which question can only be determined when all of the contentions are considered in a trial of the issues.

The cross-motion by plaintiffs to file a late notice of claim or to deem prior filings to constitute a notice of claim was denied on the ground of mootness in view of the granting of summary judgment to the defendants on the ground of res judicata. Accordingly, upon remand the cross-motion should be considered anew.

Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

Appendix F

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT, NEW YORK

Feb. 3, 1998

PETER SUDARSKY, et al.,

Plaintiffs-Appellants,

—v.—

CITY OF NEW YORK et al.,

Defendants-Respondents.

Martin M. Berger, *for plaintiffs-appellants*.
Jane S. Earle and Ira J. Lipton, *for defendants-respondents*.

Order, Supreme Court, New York County (Norman Ryp, J.), entered February 19, 1997, which denied plaintiffs' motion for leave to file a late notice of claim and granted defendants' cross motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We decline to give the prior decision of this Court in this action (220 A.D.2d 353, 633 N.Y.S.2d 26) law of the case effect as to anything other than "legal determina-

tions that were necessarily resolved on the merits in the prior decision" (Baldasano v. Bank of New York, 199 A.D.2d 184, 605 N.Y.S.2d 293). As such, none of the parties' arguments on this appeal are foreclosed. Although we do not agree that the action was untimely commenced, since CPLR 203(b)(5)(i) was applicable to Supreme Court actions during the so-called transitional period (L.1992, ch. 216; see, Campbell v. Command Sec., 216 A.D.2d 508, 509, 628 N.Y.S.2d 775), we find that a notice of claim is required for the causes of action plaintiffs assert, and that adequate notice had not been given. We decline to grant plaintiffs leave to file a late notice in the present circumstances where there is no adequate reason for plaintiffs' "delay in taking steps to obtain permission to give late notice" (Matter of Rios v. City of New York, 180 A.D.2d 801, 802, 580 N.Y.S.2d 438) and where plaintiffs' action is without substantive merit. For the reasons stated by the Federal court in dismissing plaintiffs' prior action (see, Sudarsky v. City of New York, 779 F.Supp. 287, affd. 969 F.2d 1041, cert. denied 506 U.S. 1084, 113 S.Ct. 1059, 122 L.Ed.2d 365, rehg. denied 507 U.S. 980, 113 S.Ct. 1437, 122 L.Ed.2d 803), the challenged governmental action does not fall below a "floor of constitutional protection for property owners" (Manocherian v. Lenox Hill Hosp., 84 N.Y.2d 385, 392, 618 N.Y.S.2d 857, 643 N.E.2d 479, cert. denied 514 U.S. 1109, 115 S.Ct. 1961, 1962, 131 L.Ed.2d 853).

MILONAS, J.P., and RUBIN, TOM and MAZZARELLI, JJ., concur.

Appendix G

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

INDEX NO. 29446/92—PART 22

PETER SUDARSKY, ET ANO

—v.—

THE CITY OF NEW YORK, ET AL

MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR
LEAVE TO FILE LATE NOTICE OF CLAIM

ENTERED APRIL 14, 1994
COUNTY CLERK'S OFFICE NEW YORK

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPSR para. 3212, seeking summary judgment is granted. Plaintiff's cross-motion for an order seeking leave to file a late notice of claim is denied.

From a reading of the papers it appears that the allegations submitted by the plaintiffs, in opposition to the

summary judgment motion in this action, are similar to those submitted by plaintiffs for this same action in federal court. In granting defendants summary judgment in the federal action, the Honorable Robert J. Ward determined that the factual allegations made by plaintiffs in opposition to defendants' motion did not raise any material issue of fact necessitating a trial and that defendants were entitled to judgment as a matter of law. *Sudarsky v. City of New York*, 779 F. Supp 287 (S.D.N.Y. 1991). Therefore, the doctrines of collateral estoppel and res judicata prevent plaintiffs from relitigating the same issues of the same case.

As a result of the decision above, plaintiffs' cross-motion for leave to file late notice of claim is preempted, making the issue, a moot point. Further, plaintiffs have already picked their forum and their case has already been decided. Thus, no notice of claim is required.

dated 3/22/94 Salvador Collazos

Appendix H

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

The Hon. NORMAN RYP

Part 99

Index no. 29446-92

Motion Sec. no. 09

CROSS-MOTION

Plaintiffs' motion to file a late notice of claim and defendants' CPCR 3211 cross-motions to dismiss are consolidated for determination.

This action originated in the United States District Court, Southern District of New York, where the Hon Robert J. Ward dismissed all federal claims on Dec. 6, 1991. This dismissal was affirmed by the United States Court of Appeals for the Second Circuit on May 8, 1992. Plaintiffs then commenced the herein action on Dec. 24, 1992. Defendants now cross-move to dismiss as time barred. Where an action is dismissed by a federal court on non-meritorious grounds (or procedural grounds-federal issues notice?) as herein, the plaintiff has six months to recommence the action in State Court (CPLR 205(a)) In this instance the action was dismissed on Dec. 6, 1991, said dismissal was affirmed by The U.S. Court of Appeals, 2nd Cir., on May 8, 1992. However, plaintiffs did not recommence this action until December 24, 1992, more than one (1) year after the original dismissal and seven (7) and one half months after the

affirmance of said dismissal. Accordingly, the Summons and Complaint is dismissed. Plaintiffs application to file a late notice of claim is denied as moot.

so ordered.

NORMAN RYP

Entered: Feb. 19, 1997

Appendix I

City's Letter Memo of October 31, 2001

[LOGO]

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007-2601

MICHAEL D. HESS
Corporation Counsel

October 31, 2001

United States Court of Appeals for the Second Circuit
Office of the Clerk of Court
40 Centre Street
New York, N.Y. 10007

Re: *Sudarsky v. City of New York, et al.*, Docket No. 00-9470

Your Honors:

All parties to the above captioned case appeared before this Court on October 30, 2001 and presented oral arguments. During the course of appellant's rebuttal, counsel averred that appellant had submitted alternative development proposals for the property at issue, a contention with which appellees strongly disagreed. Because appellant was unable to provide the court with specific citations to the record to support his statement, he was invited to do so in a letter brief. This letter is jointly submitted in response thereto, on behalf of the municipal appellees and the Transit appellees (the New York City Transit Authority and the Metropolitan Transportation Authority).

Appellant's attempt at demonstrating that he submitted more than one development plan for the subject property is belied by the citations he provides this Court. Appellant skillfully skirts the issue by instead pointing to portions of the record involving the certification of an easement. (*see, e.g.*, A14, an excerpt from the statement of facts in appellant's complaint which asserts that "defendants banned issuance of any permit on all of the properties and conditioned issuance of a permit upon their acceptance of an easement"; A15, a letter to appellant from the Department of City Planning which explains that because his zoning lot is situated within the boundaries of the Special Transit Land Use District, a building permit will not be granted until a specific easement volume is approved; A145, an excerpt from the statement of facts in appellant's amended complaint which again asserts that the negotiation of a transmit easement delayed his acquisition of a permit; *see also* A-197 and 427-8, (same)). Appellant thus fails to identify any evidence in the record proving that he submitted alternative plans following the down zoning of his property, instead, focusing solely on his complaint – thoroughly rejected by Judge Ward – that his rights were violated in connection with the easement requirement.

On the other hand, there are numerous citations in the record which tend to demonstrate appellant's complete lack of initiative regarding the submission of alternative development plans. For instance, although appellant himself acknowledges that he could have developed a "smaller building," (see, *e.g.*, A-145, A-197), the record reveals that no such project was ever pursued in earnest. In a letter dated June 7, 1988 from the Department of City Planning to appellant, he is encouraged to file an amended

application to develop a smaller portion of the property (A-127-128). In a letter dated March 7, 1989, the Department of City Planning notes that appellant has still not submitted additional information (A-129). The bottom line is that appellant never submitted more than one development plan before deciding to sell the property. Appellant's own comments regarding the feasibility of developing a "smaller building" on the property illustrates that alternative proposals, including smaller scale projects, were indeed possible. However, they were never formulated because he lacked the financing to continue and, in his words, had "already incurred most of the losses" (A-429-230, A-27, A-17).

In sum, appellant has failed to point to any place in the record to indicate that more than one development plan was submitted or that he was somehow deprived of all economically viable uses of the subject property. Under these circumstances, he failed to prove that the zoning regulation had such a severe economic impact on the property that it constituted an uncompensated taking.

Respectfully submitted,

Michael D. Hess,
Corporation Counsel of the
City of New York
Attorney for the Municipal
Appellees

By: /s/ Sharyn Rootenberg
Sharyn Rootenberg,
Assistant Corporation
Counsel

Ira J. Lipton,
Hoguet Newman & Regal
Attorney for the Transit
Appellees

By: /s/ Ira Lipton by SK
Ira Lipton

Appendix J

Sudarsky's Letter Memo of October 30, 2001

David J. Bederman, Esq.
Gambrell Hall
Atlanta, Georgia 30322-2770

October 30, 2001

VIA FACSIMILE (212-857-8710) & POST

Office of the Clerk
Attention: Ms. Angela Browgna
U.S. Court of Appeals for the Second Circuit
40 Centre Street
New York, New York 10007

Re: Sudarsky v. City of New York, Docket No. 00-9470

Dear Clerk:

At oral argument heard this morning in the above captioned-case, the panel (Pooler, J., presiding, with Katzmann, J., and Hurd, D.J.), requested that counsel for the Appellant provide record citations as to whether Peter Sudarsky pursued any avenues of relief or otherwise sought an "authoritative determination" of his development rights in property affected by the City's and MTA's transit easement and subsequent down-zoning. This letter memo is responsive to that inquiry.

The following record citations support the proposition that Sudarsky pursued such relief and sought such a determination:

– A14, A15 (Complaint, filed in S.D.N.Y. Oct. 29, 1999) (Department of City Planning letter of Feb. 19, 1987 refusing to issue a permit for any size building, until such

time as a transit easement had been accepted by the City and MTA)

– A145 (Amended Complaint, filed in S.D.N.Y. Aug. 15, 1990) (¶ 62) ("Plaintiff attempted to mitigate its damages by continuing to press Defendants to act on the proposed easement volume agreement, so as to obtain permission to build a smaller building, but Defendants continued in their refusal to act.")

– A197 (Complaint filed in Sup. Ct. County of New York, Feb. 17, 1993) (¶ 45) [illegible] following the effectiveness of the down-zoning the Plaintiffs continued to attempt to mitigate their damages . . . by continuing to press Defendants to define the details of the transit taking easement in order that Plaintiffs might be able to obtain permission to build a smaller building in accordance with the down-zoning, but Defendants continued in their refusal to act for a full year after the down-zoning, until Plaintiffs sold the property. . . ."

– A424 (Plaintiff's Declaration filed in the S.D.N.Y., Feb. 8, 2000, as part of his Opposition to Defendants' Motion to Dismiss under FRCP 12(b)(1) & 12(b)(6))

– A427 (¶ 5) (December 1986 application for an easement waiver)

– A428 (¶ 7) ("For almost a year after the downzoning, we continued to try to meet the defendants' requirements for certification of acceptance of an easement so that we could build a smaller building in an effort to cut our losses or, at least, to sell the property. We could not do so.")

– A428 (¶ 10) ("I relied upon offers by defendants to settle by accepting an easement and allowing me

to obtain a permit for construction on the property. I construed numerous requests by defendants for architectural and engineering information as offers to accept an easement once I provided the information which the defendants said they required. I also offered to negotiate the size and appearance of the building to meet planning objectives of defendants.") (Also making reference to a 1987 zoning study prepared for the Plaintiff, and submitted to the Defendant, City Planning Commission on Aug. 21, 1987, proposing 10 alternate configurations that could be built on the site)

– A429-30 (¶¶ 16 & 17) ("The City defendant alleges that I could have split the property at any time, thereby regaining viable economic use of it by building smaller buildings. . . . By the time the City offered to allow me to subdivide, I had already incurred most of the losses which are the subject of the suit. . . . I note that splitting the properties would not have automatically lifted the permit ban without affirmative action by the defendants.")

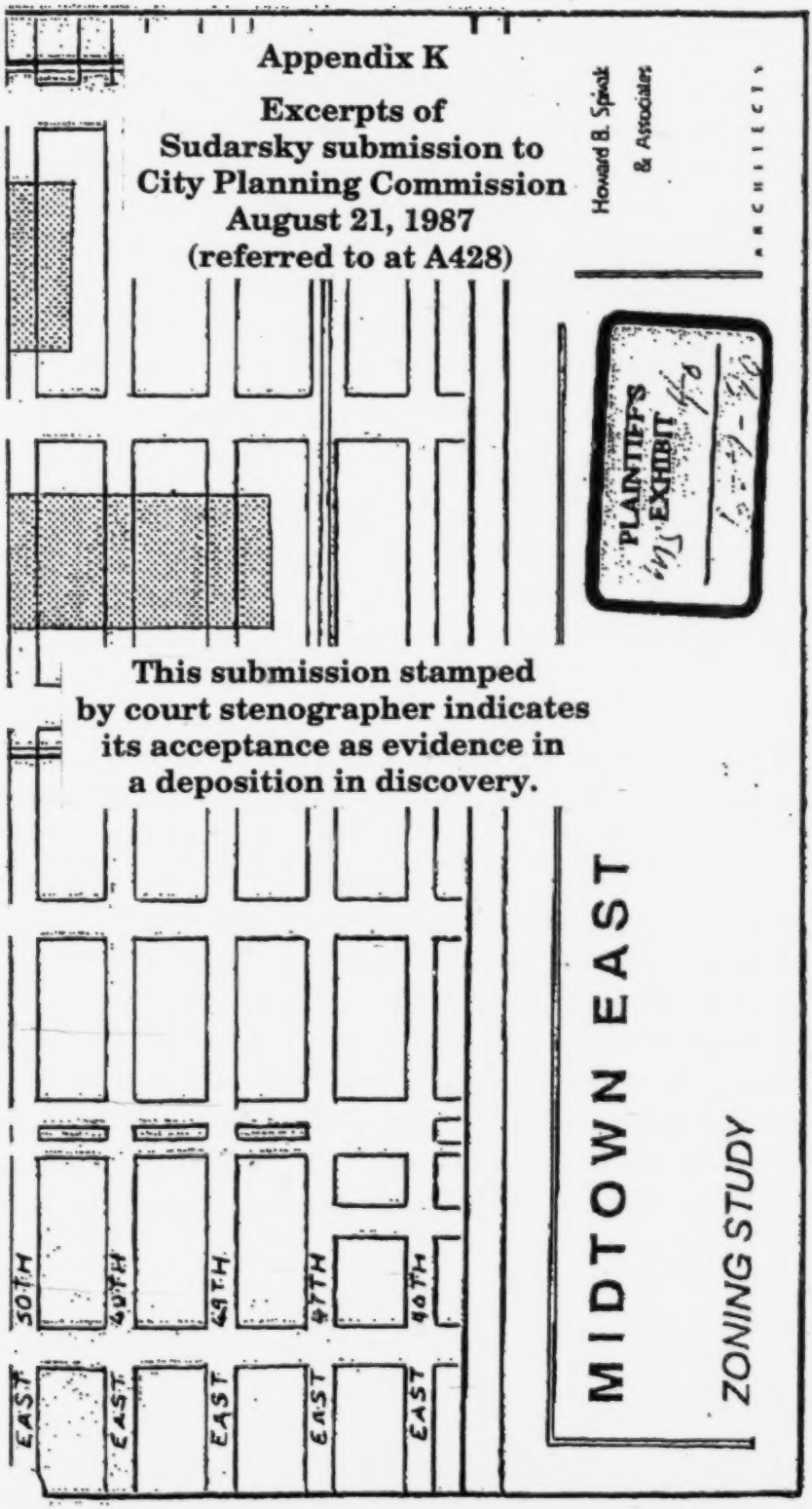
* * *

The record thus amply supports appellants' assertion that he attempted to seek avenues of relief or otherwise sought an "authoritative determination" of his development rights in his property. It scarcely needs observing that as the District Court dismissed Sudarsky's case pursuant to FRCP 12(b)(1) and 12(b)(6), see A482 & 487, averments made in his Complaint and Declaration are presumed to be true for purposes of this appeal.

Respectfully submitted,

/s/ David J. Bederman
David J. Bederman
Counsel for Appellant,
Peter Sudarsky

cc: Opposing counsel (by fax & post)



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(2)

Supreme Court, U.S.
FILED
DEC 23 2003
OFFICE OF THE CLERK

No. 03-421

In The Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

v.

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, AND THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit Requesting Reversal Of Denial Of Motion For Relief (Dated June 17, 2003) From A Final Decision Of The Court Reached In Reliance Upon Fraud Upon The Court Perpetrated By Attorneys For The Municipal Defendants In The Form Of Misrepresentation Of That Determinative Fact Upon Which The Court Relied To Dismiss A Meritorious Regulatory Takings Action

PETITION FOR REHEARING

PETER SUDARSKY
135 Central Park W
Apt. 12N
New York, New York 10023
(212) 595-7172

QUESTION PRESENTED

INTRODUCTORY STATEMENT

December 1, 2003, This Court rejected Plaintiff's Petition for Certiorari submitted on the premise that it is an abuse of judicial power to fail to grant relief from a decision reached in reliance upon fraud on the court in the form of misrepresentation of pivotal facts upon which a court relied to dismiss a takings claim without trial.

ISSUE

Does the integrity of the judicial process impose upon the federal courts an obligation to grant relief from a final decision which rests upon fraud where plaintiff has not had an opportunity to refute misrepresentation(s) upon which the court relied?

ARGUMENT:

At Yale Law School in the late 1950ies, Professor Turner of the Constitutional Law Dept., heir to Justice Douglas, lectured a packed audience in Sterling Hall of 400 supporters of three Black Panther's in jail in New Haven charged with the murder of two policemen. Tempers were flaring in the City.

"Do not demonstrate on the premise that murder of corrupt officials is appropriate," Professor Turner cautioned. "Murder is not supported by the population, but you may demonstrate in support of fair trial. The right of accused criminals to fair trial is not in dispute."

This Court endorses Professor Turner's "switch" lesson. A decision made by the Court on the basis that cities can take property for public use without paying for would undermine the Constitution. However, a decision reached on grounds that plaintiff failed to do something he might have done to define final use of the property (ripeness) whether or not he did it is obscure and not easily criticized. Lazy courts look the other way, like this one did.

Not one item of evidence or information appears in the record which substantiates a finding of failure to ripen a claim other than allegations of attorneys for the City which are undenied misrepresentations and are contradicted by facts in affirmations of plaintiff.

Where the integrity of the judicial process is compromised by the reliance of a court of appeals upon undisputed misrepresentation which a party to suit has not had an opportunity to refute, relief from a final decision should be obligatory.

The silence of This Court rewards attorneys for agencies of government who misrepresent facts. For this reason, This Court should withdraw its denial of Certiorari, grant Plaintiff's Petition, and allow trial of the issues.

A court's reliance upon attorneys for an agency of government as if they were independent fact finders demeans the concept of a government based on separation of powers. This Court's refusal to address this case provides reason for those same attorneys to continue a policy of deceit and fraud where lies can save their municipal employers enough money to make it worthwhile.

SWING TO THE LEFT: The case exemplifies a swing to the left in the federal system. Courts have granted relief on the criminal side where fraud is in evidence (Demjanjuk). Where property is concerned, the Second Circuit buries its head, supporting the taking of property to regulate its use without payment of just compensation, doing one thing but calling it something else.

DEFENDERS OF PROPERTY in its *amicus curiae* in support of plaintiff set forth that issues of fact in dispute require trial before a decision can be reached on whether Plaintiff's regulatory takings claim holds judicial water. None of the issues which follow have been argued or litigated:

1. DID DEFENDANTS TAKE ALL USE OF PROPERTY?

2. DID THE TAKING OF HALF THE DEVELOPMENT RIGHTS DENY THE OWNER VIABLE ECONOMIC USE OF THE PROPERTY?

3. DID DILATORY TACTICS OF THE MUNICIPALITY MAKE PERMANENT WHAT THE CITY PRESENTS AS A TEMPORAL TAKING?

4. DID SUBMISSIONS OF ADDITIONAL DEVELOPMENT PROPOSALS BY PLAINTIFF'S ARCHITECTS AND ATTORNEYS MEET EVERY IMAGINABLE REQUIREMENT FOR RIPENESS?

5. WAS THE TAKING EFFECTED ABSENT LEGITIMATE PUBLIC PURPOSE?

CONCLUSION: Where a party to suit has not had an opportunity to refute misrepresentations upon which a decision rests and where trial of a case appears likely to result in a change of decision, the integrity of the judicial process requires relief.

Judicial shorthand with which courts speak to each other like "lack of substantive merit" and the term, "unpublished," should not enable courts below to insulate themselves from judicial review as has happened here.

In *Sorrells v. United States* This Court accepted responsibility for the purity of its "judicial temple" as intended by the Founders.

This Court's rejection of Certiorari in these circumstances is a judicial evasion of responsibility by which the Court identifies itself as a Court of Wimps.

The Court's justices are out of school. What kind of Country do we live in?

Submitted by

PETER SUDARSKY,
appellant, plaintiff, pro se

Plaintiff certifies that this petition is submitted in good faith, not for delay and is based on substantial grounds not previously presented per Court's rule 44. Facts in this Petition have not been disputed by N.Y.C.

Plaintiff does so certify.

PETER SUDARSKY

APPENDIX A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 1, 2003

Mr. Peter Sudarsky
135 Central Park West
No. 12N
New York, NY 10023

Re: Peter Sudarsky
v. City of New York, New York, et al.
No. 03-421

Dear Mr. Sudarsky:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk